

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Customs and  
Patent Appeals and the United States  
Customs Court

Vol. 8      NOVEMBER 27, 1974      No. 48

*This issue contains*

T.D. 74-288 and 74-289

C.A.D. 1134 and 1135

C.D. 4562 and 4563

Protest abstracts P74/821 through P74/826

Reap. abstracts R74/366 through R74/369

Tariff Commission Notices

DEPARTMENT OF THE TREASURY  
U.S. Customs Service

# Customs Bulletin

Customs Service, U.S. Department of Commerce  
Washington, D.C. 20402

## Abstracts of Decisions

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### NOTICE

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# U.S. Customs Service

(T.D. 74-288)

## *N. Methyl Glucamine*

Decision in C.D. 4366 (decided July 20, 1972) that item 425.20, TSUS, covers all forms of monoamines, including "substituted derivatives," limited

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
Washington, D.C., November 8, 1974.

In *Rhodia, Inc. v. United States* (C.D. 4366), the United States Customs Court held that "N-Methyl Glucamine," a methylamino substituted glucose, was classifiable under item 425.20, TSUS, which covers certain well-defined monoamines.

Since another case is pending covering similar merchandise and issues, the above decision is limited to the merchandise which was before the court.

(CLA-2:R:CV:MC)

VERNON D. ACREE,  
Commissioner of Customs.

(T.D. 74-289)

## *Foreign currencies—Daily rates for countries not on quarterly list*

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
Washington, D.C., November 6, 1974.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below.

These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR Part 159, Subpart C).

### Hong Kong dollar;

October 28-November 1, 1974 - - - - \$0.1980

Iran rial:

October 28–November 1, 1974 \$0.0149

### Philippines peso:

October 28, 1974 \$0.1475

October 29, 1974 1474

October 30, 1974 1674

October 30, 1974 . . . . . 1474  
October 31, 1974 . . . . . 1474

October 31, 1974 . 1474  
November 1, 1974 . 1484

November 1, 1974.

Singapore dollar: \$

October 28, 1974----- \$0.4145

October 29, 1974 4161

October 30, 1974 - Page 10 - Indian Gazette - 4161

October 31, 1974 4165

November 1, 1974 4175

November 1, 1971

iland baht (tical):

October 28–November

-3-O:D:T)

R. N. MARRA

R. N. MARRA,  
Director

*Director,*  
P. & G. Co., Ltd.

R. N. MARRA,

*Director.*

*Director,  
Duty Assessment Division.*

156-17 (1)

COUNTS OF ELECTRICAL AND MAGNETIC QUANTITIES

активистов Майдана. Активисты считают, что виноваты в этом и сами активисты, которые не соблюдали правила демонстраций.

For example, the following statement is legal in C and C++ but illegal in Java:

# Decisions of the United States Court of Customs and Patent Appeals

**KNOWLES ELECTRONICS; J. E. BERNARD & CO., INC. v. THE UNITED STATES.**

## 1. CLASSIFICATION OF IMPORTS—MICROPHONES AND CABLES

Customs Court judgment holding certain miniature microphones and coils, intended for assembly into hearing aids, classifiable as microphones under TSUS 684.70 and as inductors under TSUS 682.60 respectively, affirmed.

## 2. CONGRESSIONAL INTEREST

The importer failed to show that TSUS 684.70 was not intended by Congress to be a specific provision for the microphones at bar; heading 85.14 of the *Brussels Nomenclature* is not evidence of Congressional intent clear enough to require classification of the microphones outside the *eo nomine* provision.

### 3. PRESUMPTION OF CORRECTNESS

The finding of the Customs Court that the importer had not overcome the presumption of correctness attaching to the classification of the coils under TSUS 682.60 is amply supported by the evidence; it was well within the province of the Customs Court as the trier of fact to accept the testimony of the Government's witness that the coils function as inductors.

**United States Court of Customs and Patent Appeals, November 7, 1974**

**Appeal from United States Customs Court C.D. 4483**

[Affirmed.]

*Barnes, Richardson & Colburn*, attorneys of record, for appellants. *Joseph Schwartz* and *John W. Hupp*, of counsel.

*Carla A. Hills*, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *David A. Ast* for the United States.

[Oral argument October 3, 1974 by Joseph Schwartz and John W. Hupp for appellants and by David A. Ast for appellee]

Before MARKET, Chief Judge, RICH, BALDWIN, LANE, and MILLER, Associate Judges.

RICH, Judge.

[1] This appeal is from the judgment of the United States Customs Court, 71 Cust. Ct. 112, C.D. 4483, 371 F. Supp. 1393 (1973), overruling in part appellants' consolidated protests against the classification of merchandise imported from England in 1966 and 1969. We affirm.

The merchandise consists of miniature electrical devices, invoiced as microphones, coils, and receivers, which the Government concedes were intended for assembly into hearing aids.<sup>1</sup> Appellants claim the goods are classifiable under item 709.50, TSUS, as parts of hearing aids. The microphones and receivers were classified by Customs under item 684.70, TSUS, as "microphones"; the coils were classified under item 682.60, TSUS, as "inductors."<sup>2</sup>

The relevant statutory provisions are:

#### SCHEDULE 6.—METALS AND METAL PRODUCTS

##### Part 5.—Electrical Machinery and Equipment

###### Part 5 headnotes:

1. This part does not cover—

\* \* \* \* \*

(vi) electrical instruments and apparatus provided for in schedule 7.

Generators, motors, motor-generators, converters (rotary or static), transformers, rectifiers and rectifying apparatus, and inductors; all the foregoing which are electrical goods, and parts thereof:

\* \* \* \* \*

682.60	Other -----	12% ad val.
--------	-------------	-------------

\* \* \* \* \*

<sup>1</sup> The Government concedes also that the microphones, but not the coils, are chiefly used as parts of hearing aids.

<sup>2</sup> The Government admitted in its answer that the receivers were properly classifiable under item 709.50 and judgment was entered sustaining the protests to that extent.

684.70 Microphones; loudspeakers; headphones; audio-frequency electric amplifiers; electric sound amplifier sets comprised of the foregoing components; and parts of the foregoing articles (including microphone stands). 15% ad val.

\* \* \* \* \*

**SCHEDULE 7.—SPECIFIED PRODUCTS;  
MISCELLANEOUS AND NONENUMERATED PRODUCTS**

**Part 2— Optical Goods; Scientific and Professional Instruments  
Watches, Clocks, and Timing Devices; Photographic  
Goods; Motion Pictures; Recordings and Recording  
Media**

\* \* \* \* \*

**Subpart B.— Medical and Surgical Instruments  
and Apparatus; X-ray Apparatus**

\* \* \* \* \*

709.50 Hearing aids and parts thereof----- 12% ad val.  
[1966 rate]  
9.5% ad val.  
[1969 rate]

**GENERAL HEADNOTES AND RULES OF  
INTERPRETATION**

**10. General Interpretative Rules.** For the purposes of these schedules—

\* \* \* \* \*

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, *but does not prevail over a specific provision for such part.* [Emphasis ours.]

The parties and the court below have treated the microphones and coils separately. So shall we.

The Microphones

The Customs Court held that appellants failed to show that the imports invoiced as microphones were not "microphones" within the ambit of item 684.70. Appellants concede that the imported goods are commonly known in the trade as "microphones" and that item 684.70 is an *eo nomine* provision for microphones. The Customs Court found that the primary function of the goods at bar is conversion of acoustical energy into electrical energy, fitting the technical definition of "microphones." These findings clearly conform to the weight of the evidence and we accept them. *Montgomery Ward & Co. v. United States*, 61

CCPA —, C.A.D. 1131, 499 F.2d 1288 (1974). Appellants contend, however, that item 684.70 is not a specific provision for the microphones at bar and thus General Interpretative Rule 10(ij) does not require classification of these microphones under the *eo nomine* provision.

[2] In the absence of contrary legislative intent, an *eo nomine* provision for an article includes all forms of the article. *Nootka Packing Co. v. United States*, 22 CCPA 464, T.D. 47464 (1935). Appellants have not demonstrated that the term "microphones" in item 684.70 was not intended by Congress to include the merchandise at bar.

Appellants agree with the Customs Court that there is minimal direct legislative history to indicate what Congress intended the breadth of item 684.70 to be and suggest that heading 85.14 to the *Brussels Nomenclature*<sup>3</sup> fills the gap, alleging that the scheme adopted by Congress is similar thereto. Even were there some basis to conclude that Congress enacted the *substance* of the Tariff Schedules with this heading to the Brussels Nomenclature in mind,<sup>4</sup> we do not consider heading 85.14 to be evidence of intent clear enough to require classification of these microphones outside the *eo nomine* provision.

Appellants argue in the alternative that "parts of hearing aids" is a designation more specific to the merchandise at bar than "microphones" and that accordingly the rule of relative specificity<sup>5</sup> requires classification as parts of hearing aids. We disagree. Item 709.50 includes parts of electrical hearing aids unnamed in item 684.70, such as the case and the power supply; the legislative history of the item shows it is also intended to cover ear trumpets and other non-electrical hearing aids.<sup>6</sup> The term "microphone" on the other hand pertains only to electrical devices which convert acoustical energy into electrical energy. This is not a case like *C. J. Tower & Sons v. United States*, 44 CCPA 41, C.A.D. 634 (1957), where the tariff term was shown not to include everything falling within its literal scope. We there rejected the argument that all corn is "corn," in light, *inter alia*, of prior administrative construction.

<sup>3</sup> The Explanatory Note to this heading indicates that it covers "microphones, loud-speakers, and audio-frequency amplifiers of all kinds imported separately, regardless of the particular purposes for which such apparatus may be designed." [Emphasis ours.] Heading 85.14 provides expressly that it does not cover "deaf aids." We do not understand appellants to contend that the microphones are themselves "deaf aids."

<sup>4</sup> *Tariff Classification Study, Submitting Report* (1960), at 8.

The "Brussels Nomenclature" and the "Standard Industrial Classification Manual" exerted the greatest influence on the arrangement of the proposed revised schedules. [Emphasis ours.]

*Schwartz v. United States*, 57 CCPA 19, C.A.D. 971, 417 F.2d 1891 (1969); *F. L. Smith & Co. v. United States*, 56 CCPA 77, C.A.D. 958, 409 F.2d 1369 (1969).

<sup>5</sup> General Interpretative Rule 10(e) provides:

\* \* \* an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it \* \* \*.

<sup>6</sup> *Tariff Classification Study*, Vol. 9 at 147.

We conclude that the Customs Court properly read the term "microphones" in accordance with its meaning in the trade, see *Brown Boveri Corp. v. United States*, 53 CCPA 19, C.A.D. 870 (1966), and agree that appellants did not overcome the presumption of correctness attaching to the Government's classification.<sup>7</sup>

#### The Coils

The Customs Court opinion observes:

In short, the evidence does preponderantly establish that the imported coils are manufactured to exacting design specifications; that the imported coils are not made to any specific level of inductance; that the inductance of the coil is secondary to the design considerations, and that the imported coils are dealt with in the trade as "coils" rather than as "inductors". The sum of that evidence, however, is not sufficiently relevant to overcome the presumption that the coils, in the manner of their use and application in miniature magnetic transducers, are inductors within the common meaning of the term. To the contrary, as I suggested earlier, the evidence of how the coils function in transducers tends to support the classification of these imported coils as inductors.

Plaintiffs' witnesses testified to the use and function of the imported coils in miniature magnetic transducers and flatly opined that the imported coils were not inductors. But their opinions, as mentioned earlier, were preponderantly based on facts too inconclusive to establish that the coils were not inductors in the common meaning of the tariff term. The lack of concern for the property of inductance in the coils, constantly adverted to in the testimony, in my opinion, is quite immaterial since the inductance native in the coils is not established to be insufficient for application in miniature magnetic transducers. Plaintiffs' witnesses also testified that the function of the coils involved a process of induction which they said was not inductance. Such testimony, in my opinion, does no more than suggest a possible distinction which, for all that is said, may be a distinction without a difference.

One of plaintiffs' witnesses testified that the induction process he described was different from inductance as defined by McGraw-Hill, for the reason there was not current creating the magnetic field. Weighing the testimony of plaintiffs' witnesses on cross-examination, however, it is apparent that while they were inclined to equivocate, they were unable to deny that the imported coils have the property of inductance and that the manner in which

<sup>7</sup> Appellants consider the Government's admission that the receivers (output transducers) are classifiable under item 709.50 strong evidence that the microphones, which are similar in structure to the receivers, should be classified likewise. There is argument, but no evidence of record, concerning the Government's motives in conceding the protest as to the receivers. In the absence of explanatory evidence, the Customs Court saw no reason to give the Government's admission any weight with respect to the classification of the microphones, nor do we.

the imported coils function in miniature magnetic transducers is a process of induction.

\* \* \* \* \*

Thus, notwithstanding plaintiffs' witnesses were of the opinion that the coils were not inductors, their explanation of the function of the coils in miniature magnetic transducers strongly supports that the coils do function to assist in the conversion of energy by inductance. The classification of the coils as inductors is presumed to include each and every fact necessary to support the classification. *E. I. du Pont de Nemours & Co. v. United States*, 27 CCPA 146, 149, C.A.D. 75 (1939), and the explanation of the function of the coils appears to involve electromagnetic induction which, as discussed in the *McGraw-Hill Encyclopedia of Science and Technology*, Vol. 7, at 69, is:

The production of an electromotive force either by motion of a conductor through a magnetic field in such a manner as to cut across the magnetic flux or by a change in the magnetic flux that threads a conductor.

The customs classification is further supported by the opinion of defendant's witness, who testified that the coils are inductors and explained in fuller detail than did plaintiffs' witnesses the manner in which the coils function as inductors in miniature magnetic transducers to produce an electromotive force. [Footnotes omitted.]

We find appellants' explanation of the difference between "induction" and "inductance" in the context of the function of the coils in transducers no more convincing than did the Customs Court, which had the parties' witnesses before it and was in a better position than we are, on the appellate level, to assess their credibility.

[3] Based on our consideration of the conflicting testimony and exhibits, the oral arguments, and the briefs, we conclude that the findings of the Customs Court reproduced *supra* are amply supported by the evidence. We agree that evidence the coils were not *designed* with inductance in mind, when rebutted by evidence the coils actually *function* by the process of induction when used in transducers, does not prove that the coils are not "inductors" for tariff purposes. It was also well within the province of the Customs Court as the trier of fact to accept the testimony of the Government's witness, an employee of a large manufacturer of these coils, that the coils function as inductors in transducers.

The judgment of the Customs Court is *affirmed*.

(C.A.D. 1135)

**SCHIEFFELIN & Co. v. THE UNITED STATES**

(No. 74-16—F. 2d—)

**1. REAPPRAISEMENT—EXPORT VALUE—GENERALLY**

Customs Court, Appellate Term, judgment affirming judgment of single judge sitting in reappraisement, holding that "advertising allowance" of \$2.00 per case of imported cognac brandy was properly included in determining export value under § 402(b) of the Tariff Act of 1930, as amended, 19 USC 1401a(b), affirmed.

**2. CCPA—SCOPE OF REVIEW—REAPPRAISEMENT CASES**

Scope of review in reappraisement case in which trial commenced before October 1, 1970, is controlled by old version of 28 USC 2637 under which findings of fact of Appellate Term will not be disturbed if there is substantial evidence to support findings.

**3. SUBSTANTIAL EVIDENCE**

Importer may change method of doing business to reduce customs duties, but question is whether or not a change in substance was actually effected. Appellate Term finding that \$2.00 per case advertising allowance was change in invoicing procedure for purpose of transmitting exporter's advertising funds to importer, and that, therefore, this amount was one of exporter's expenses, is supported by substantial evidence.

**4. BURDEN OF PROOF—CLAIMED VALUE—EXPORT VALUE**

Having found that \$2.00 per case advertising allowance was one of exporter's expenses, Appellate Term was correct in concluding that this amount was properly included in determination of export value; therefore, importer had not met its burden of proving that its claimed value (invoice price) represented export value.

United States Court of Customs and Patent Appeals, November 7, 1974

Appeal from United States Customs Court, A.R.D. 317

[Affirmed.]

*Barnes, Richardson & Colburn*, attorneys of record, for appellant, *James F. Donnelly* and *James S. O'Kelly*, of counsel.

*Carla A. Hills*, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Gilbert Lee Sandler* for the United States.

[Oral argument on October 3, 1974 by *James S. O'Kelly* for appellant and by *Gilbert Lee Sandler* for appellee]

Before MARKEY, Chief Judge, RICH, BALDWIN, LANE and MILLER, Associate Judges.

LANE, Judge.

[1] This appeal is from the judgment of the United States Customs Court, First Division, Appellate Term, 71 Cust. Ct. 209, A.R.D.

317, 360 F. Supp. 1386 (1973), affirming the judgment of a single judge sitting in reappraisal, 67 Cust. Ct. 549, R.D. 11759 (1971). The parties agree that export value, as defined in section 402(b) of the Tariff Act of 1930, as amended, 19 USC 1401a(b),<sup>1</sup> is the proper basis for valuation, and the sole controversy now is over the inclusion of a \$2.00 per case "advertising allowance" in arriving at export value. The trial court and the Appellate Term held that the \$2.00 per case advertising allowance was properly included in determining export value. We affirm.

The merchandise consists of two shipments of Bras Arme Cognac brandy in one-tenth gallon bottles packed 24 per case (2.4 gallons per case) produced in Cognac, France, by Jas. Hennessy & Co. (Hennessy) and exported in September and November, 1964 to Hennessy's selected purchaser in the United States, Schieffelin & Co. (Schieffelin), the importer-appellant here. The record indicates that Schieffelin was the exclusive distributor in the United States for Hennessy Cognac. The Appellate Term opinion contains a sufficient statement of the historical background relating to the so-called "Chicken War" Proclamation (Presidential Proclamation No. 3564, issued December 4, 1963, effective January 7, 1964) and how that proclamation induced Hennessy and Schieffelin to change their method of invoicing in an effort to avoid the \$5 per gallon duty on brandy valued over \$9.00 per gallon (which extrapolates to a case containing 2.4 gallons of brandy valued over \$21.60). We adopt that portion of the Appellate Term opinion as our own.

The subject brandy was entered at the port of New York at an invoice price of \$21.495 per case. This figure represents Hennessy's FOB French port list price of \$25.40 per case, less a 7½ percent distributor's discount, less the disputed \$2.00 per case advertising allowance. The merchandise was appraised on the basis of export value at a higher value (above the invoice price and also above \$21.60 per case) which in effect included the \$2.00 per case advertising allowance. The trial court found as a fact that the brandy was sold in France for exportation to the United States in the ordinary course of trade and in the usual wholesale quantities at a price of \$25.40 per case,

<sup>1</sup> 19 USC 1401a(b) reads as follows:

(b) Export Value.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisal, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

less a 7½ percent distributor's discount (net price \$28,495 per case), which price fairly reflected the market value of such merchandise. The trial court concluded as a matter of law that the export value was \$25.40 per case, less the 7½ percent distributor's discount (net value \$23,495 per case). The Appellate Term affirmed and incorporated by reference the trial judge's findings of fact and conclusions of law.

In this court, as before the trial court and the Appellate Term, appellant's contention is that the invoice price of \$21,495 per case is the export value.

[2] Since this is a reappraisal case in which the trial commenced before October 1, 1970, the following statute controls the scope of our review:

28 USC 2637. Review of decision of divisions

The decision of a division of the Customs Court, in any matter within its jurisdiction shall be the decision of such court, and shall be final and conclusive upon all parties, unless a party to such proceeding takes an appeal to the Court of Customs and Patent Appeals within the time and manner provided in section 2601 of this title, but if the decision relates to a reappraisal of merchandise, such appeal to the Court of Customs and Patent Appeals shall be upon questions of law only. [Emphasis added.]

This is the old version of 28 USC 2637, i.e.—prior to the amendment made by The Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274, effective October 1, 1970. Since the trial of the instant case commenced on February 4, 1970, the old section applies by virtue of § 122(a) of Pub. L. No. 91-271, 84 Stat. 281.

The effect of the statute is that the findings of fact of an Appellate Term of the Customs Court in a reappraisal case will not be disturbed if there is substantial evidence in support of those findings. It is not our province to weigh the evidence. See *Bud Berman Sports-wear, Inc. v. United States*, 60 CCPA 34, 469 F. 2d 1107, C.A.D. 1077 (1972), and *United States v. Josef Mfg., Ltd.*, 59 CCPA 146, 460 F. 2d 1079, C.A.D. 1057 (1972).

The Appellate Term found that prior to 1964 Schieffelin placed advertising and laid out money for Hennessy (for which it was subsequently reimbursed) to promote the sale of Hennessy products in the United States. The Appellate Term further found that during 1964 this method of doing business did not change in substance, although there was a change in form. During 1964, instead of making periodic reimbursements to Schieffelin on a lump sum basis, Hennessy paid for such advertising *in advance* by subtracting the \$2.00 per case advertising allowance from the FOB list price of Bras Arme tenths.

[3] An importer may change his method of doing business to reduce customs duties, but as in *Bud Berman Sportswear, Inc. v. United States*, supra, the question here is not one of motives but whether or not a change in substance was actually effected.

We agree with the Appellate Term that there was no change in the manner of doing business but simply a change in the invoicing procedure. The record amply supports the finding that during 1964 the \$2.00 per case advertising allowance was part of Hennessy's general business expense incurred in connection with its exports to the United States. The correspondence between Hennessy and Schieffelin found in Defendant's Exhibit B clearly shows that during 1964, as in 1963, Hennessy was intent on bearing the major portion of actual advertising expenses in the United States. Also, the testimony of Mr. Gerald deGeoffre deChabignac, one of the three managing directors of Hennessy, indicates that the \$2.00 per case advertising allowance was entered on the Hennessy accounting books as an amount spent for advertising. Hence, the \$2.00 per case advertising allowance was a means for transmitting Hennessy's advertising funds to Schieffelin, and, therefore, this amount was one of Hennessy's expenses. This characterization, formulated by the trial court and adopted by the Appellate Term, is supported by substantial evidence.

[4] Having found that this amount of advertising placed in the United States during 1964 (\$2.00 per case of Bras Arme tenths) was one of Hennessy's expenses, it was correct for the Appellate Term to conclude that the \$2.00 per case advertising allowance was properly included in the determination of the export value of the merchandise. See *Erb & Gray Scientific, Inc. v. United States*, 53 CCPA 46, C.A.D. 875 (1966), *Bud Berman Sportswear, Inc. v. United States*, supra, and *Norco Sales Co. v. United States*, 65 Cust. Ct. 778, R.D. 11732, 319 F. Supp. 1399 (1970).

Since the \$2.00 per case advertising allowance was properly included as a component of export value, appellant has not met its burden of proving that its claimed value (the invoice price of \$21.495 per case) represented the export value of the merchandise. The judgment of the Customs Court is *affirmed*.

# Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza  
New York, N.Y. 10007

*Chief Judge*

Nils A. Boe

*Judges*

Paul P. Rao

James L. Watson

Morgan Ford

Herbert N. Maletz

Scovel Richardson

Bernard Newman

Frederick Landis

Edward D. Re

*Senior Judges*

Charles D. Lawrence

David J. Wilson

Mary D. Alger

Samuel M. Rosenstein

*Clerk*

Joseph E. Lombardi

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## *Customs Decisions*

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(C.D. 4562)

JOHN C. ROGERS & CO., INC., a/c HOEGANAES SPONGE IRON CORP.  
*v.* UNITED STATES

*Fire brick—Abrasives*

### FIRE BRICK—COMMON MEANING

The tariff term "fire brick" in 1930 did not commonly include all articles used to resist heat, but only those heat-resistant articles used

in the construction of lining for furnaces, ovens, and similar installations.

#### FIRE BRICK

Imported articles, consisting of hollow tubes, rings and disks of silicon carbide which are assembled into a chamber on a kiln car and filled with a mixture of iron ore, coke and limestone that is passed into a furnace to reduce the iron ore into sponge iron held not to be "fire brick." *John C. Rogers & Co., Inc., a/c Hoeganaes Sponge Iron Corp. v. United States*, 64 Cust. Ct. 12, C.D. 3952 (1970), aff'd 58 CCPA 104, C.A.D. 1012, 436 F.2d 1034 (1971) followed.

#### ABRASIVES

In order for an article to be classified under paragraph 1514 of the Tariff Act of 1930 as a manufacture of which an artificial abrasive is the component material of chief value, the article must be chiefly used as an abrasive. Thus, although the imported articles are in chief value of silicon carbide—which is an artificial abrasive within the meaning of paragraph 1514—they do not come within the purview of that paragraph since they are not used as an abrasive but rather are used as refractory items.

Court Nos. 64/20746, etc.

Port of Philadelphia

[Judgment for defendant.]

(Decided October 31, 1974)

*Donohue and Shaw (Charles P. Deem of counsel) for the plaintiff.*

*Carla A. Hills, Assistant Attorney General (Martin L. Rothstein and John N. Politis, trial attorneys), for the defendant.*

MALETZ, Judge: These consolidated cases involve the proper tariff classification of articles invoiced as saggers, rings, and fire bricks that were manufactured in West Germany, exported from West Germany and Sweden, and entered at the port of Philadelphia. The imported articles consist of hollow tubes, rings and disks of silicon carbide. In use, the articles are assembled into a chamber on a kiln car and filled with a mixture of iron ore, coke and limestone. The loaded car is then passed through a tunnel kiln where the iron ore is reduced into sponge iron.

The present importations are essentially the same as those involved in *John C. Rogers & Co., Inc., a/c Hoeganaes Sponge Iron Corp. v. United States*, 64 Cust. Ct. 12, C.D. 3952 (1970), aff'd 58 CCPA 104, C.A.D. 1012, 436 F.2d 1034 (1971) (hereafter referred to as "*Rogers I*"), the record in which case has been incorporated here. And as in *Rogers I*, the present importations were classified by the government

as articles, wholly or in chief value of earthy or mineral substances, not specially provided for, dutiable at 15% ad valorem under paragraph 214 of the Tariff Act of 1930, as modified by T.D. 51802.

Plaintiff contends—as it did in *Rogers I*—that the imported merchandise is properly classifiable as “fire brick” and thus dutiable at 5% ad valorem under paragraph 201(a) of the 1930 Act, as modified by T.D. 54108. Additionally, plaintiff interposes a new alternative claim that if the articles are not “fire brick,” they are properly classifiable as manufactures in chief value of artificial abrasive (*viz.*, silicon carbide) under paragraph 1514 of the 1930 Act, as modified by T.D. 52739, and therefore dutiable at the rate of 5% ad valorem.<sup>1</sup>

The relevant statutory provisions are as follows:

Classified under:

Paragraph 214, Tariff Act of 1930, as modified:

Earthy or mineral substances wholly or partly manufactured and articles, wares, and materials (crude or advanced in condition), composed wholly or in chief value of earthy or mineral substances, not specially provided for, whether susceptible of decoration or not (except synthetic materials of gem stone quality, such as corundum and spinel, and articles and wares composed wholly or in chief value of such materials, and except marble chip or granito):

If not decorated in any manner:

\* \* \* \* \*

Other ----- 15% ad val.

Claimed under:

Paragraph 201(a), Tariff Act of 1930, as modified:

Fire brick, not specially provided for----- 5% ad val.

Alternatively claimed under:

Paragraph 1514, Tariff Act of 1930, as modified:

All the following, if not containing over 0.1% of vanadium, or over 0.2% of tungsten, molybdenum, boron, tantalum, columbium or niobium, or uranium, or over 0.3% of chromium:

\* \* \* \* \*

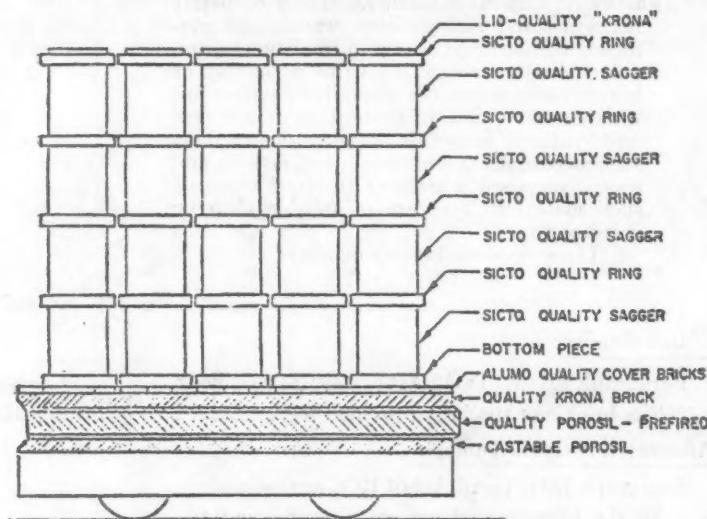
<sup>1</sup> In its complaint, plaintiff made a further alternative claim for classification of the imported merchandise under paragraph 1558 of the 1930 Act, as modified by T.D. 52739 as manufactured articles, not specially provided for. This claim, however, has not been briefed by plaintiff and is therefore deemed abandoned.

Manufactures of which corundum or artificial abrasive is the component material of chief value, not specially provided for (except wheels in chief value of corundum or silicon carbide) 5% ad val.

## I

The merchandise which, as previously noted, is essentially the same as that involved in *Rogers I* was aptly described by the appellate court in that case as follows (58 CCPA at 106) :

The imports consist of molded, silicon carbide tubes and internally flanged rings. The tubes are about 18 inches in length and 14 inches in outside diameter with  $\frac{3}{4}$  inch thick walls. The flanged rings are adapted to receive the ends of the tubes and interlock them in stacks as illustrated in plaintiff's exhibit 7, which shows the tubes and rings assembled into furnaces or reaction chambers to be exteriorly heated, supported on a kiln car:



When assembled as illustrated above, except for the addition of the lids, the resulting structures are charged with a mixture of iron ore, coke, and limestone, the lids are placed on their tops, and the loaded kiln car is introduced into a kiln in which the iron ore is reduced to sponge iron.

As pointed out by the trial court in *Rogers I*, the importations are used in the following manner (64 Cust. Ct. at 14):

\* \* \* The tubes and rings are often, but not always, used with a bottom plate \* \* \* which is leveled with mortar on the platform form of a kiln flat car. A tube is put on the bottom plate; a ring is put on the tube, then another tube, another ring, and so on until four tubes and four rings are pyramided on one another, into a so-called reaction chamber. Twenty such chambers are built up on a kiln flat car. The outside rings of each chamber touch on one another to provide a "good mesh of stability to the individual chambers," \* \* \*. No mortar is used between the tubes and rings since "the material itself sweats a little and it bonds itself fairly nicely; enough for \* \* \* [Hoeganaes] purposes." \* \* \*

Each of the chambers is next filled or charged with raw materials consisting of a hollow iron ore cylinder, about six feet tall, embedded in a mixture of coke and limestone. After the chambers are filled, they are topped with a lid. The kiln flat cars with the chambers charged and lidded, are then moved, like railroad cars, through a kiln tunnel, \* \* \*. The kiln tunnel is a continuous operation; as one kiln car leaves the tunnel (the number of kiln cars in the tunnel at the same time is not a matter of record, but is apparently more than one), another enters the tunnel. It takes "in the order" \* \* \* of 35 hours to heat the chambers built on the kiln cars and effect reduction, by coke, of the iron ore into fairly strong, but hollow porous cylinders of iron, which are pulled out of the various chambers by specially designed tongs. The residue coke and limestone is then vacuumed out of the chambers. The chambers, unless there is damage requiring repair, are again recharged and put through the tunnel cycle.

Against this background, the trial court in *Rogers I* determined that the provision for "fire brick" was a use provision and concluded, on the basis of lexicographic authorities and administrative publications, that the common meaning of the term "fire brick" in 1930 covered only a refractory (i.e., a nonmetallic heat-resistant article) used in the construction of linings for furnaces, ovens and similar installations and that, contrary to plaintiff's contention, did not include all refractory shapes "used for the purpose of resisting intense heat" such as "saggers and kiln furniture." 64 Cust. Ct. at 18. The trial court further concluded (*id.* at 19) that the importations did not "fairly and clearly" meet the essential criteria for "fire brick" on the following stated basis (*ibid.*):

These imported tubes and rings, in the condition as imported, meet rather exacting specifications. \* \* \* All that needs to be done is to assemble the tubes and rings into a chamber which may, or may not be, akin to a furnace, oven, or exotic sagger. Assembling the tubes and rings into a chamber is not "fairly and clearly" like constructing a furnace or oven. Fire brick used in the construction of a furnace or oven also connotes a masonry unit of a sort. These tubes and rings are not used as masonry units. They are prefabricated units designed to fit together in an orderly manner and

more than mere fire brick which, along with some special, but still standard shapes, are used as linings for furnaces and ovens. \* \* \* There is no need to further expound on the distinctions. They are carefully lexiconed. Nowhere have we found that the word "assemble" is synonymous with the word "construction" or "construct". We are satisfied that these distinctions are valid, and that they are fatal to the classification of these imported tubes and rings as "fire brick".

In affirming, the appellate court held that "the lower court's determination that the common meaning of the term 'fire brick,' as of the effective date of the Tariff Act of 1930, did not cover custom-designed, major components of prefabricated structures, such as the importations at bar, is not clearly contrary to the weight of the evidence." 58 CCPA at 108. The appellate tribunal further pointed out that the trial court had concluded that the importations did not come within the common meaning of the term "fire brick" "because they are 'prefabricated units' designed to be *assembled* into the furnaces and not 'masonry units' designed to be used in *constructing* them." 58 CCPA at 110. [Emphasis in original.] On this aspect, the appeals court stated that "[w]e cannot say that \* \* \* [the trial court's] conclusion that this distinction is in accord with the common meaning of the term 'fire brick' as of the effective date of the statute here involved is clearly contrary to the weight of the evidence." *Ibid.*<sup>2</sup>

## II

In the present case, plaintiff called, in addition to the president of Hoeganaes, two expert witnesses to support its contention that all refractory shapes used for the purpose of resisting intense heat were, in 1930, commonly included in the term "fire brick." The first of these witnesses was Harold A. Heiligman, a self-employed refractory consultant, who had also testified for plaintiff in *Rogers I*. At the present trial, he testified that in 1930 the term "fire brick" meant a refractory which was formed into a specified shape and then fired; that fire brick was made in a great variety of shapes including special shapes made to form rings and muffles; that in 1930, in characterizing articles as fire brick, no distinction was made between articles that were used as masonry articles and custom-designed articles that were assembled into

<sup>2</sup> The trial court also noted that "It is the consensus of the reference authorities, *supra*, that 'fire brick' comes in a variety of sizes and shapes. We have, therefore, eliminated size and shape as essential criteria for 'fire brick'. For the same reason we rule out limiting the term 'fire brick' to the generally accepted connotation of rectangular shaped brick, or shapes with one 'classically rectangular side' which is what defendant argues for." 64 Cust. Ct. at 18. As to this, the appeals court found that it was "unnecessary to comment on the Government's contention, rejected below, that, as of the effective date of the Tariff Act of 1930, the term 'fire brick' was commonly applied only to articles which were small and which had at least one planar, rectangular face." 58 CCPA at 108.

refractory structures; that the term "fire brick" included custom-designed major components of prefabricated structures; and that fire bricks were not always mortared together (e.g., the bottoms in open hearth furnaces were put in dry, as were many refractory roofs).

Mr. Heiligman further testified that the importations in issue are not describable as kiln furniture<sup>3</sup> but rather are fire brick; and that the fact that the importations (i) are in the shape of tubes and rings, (ii) are custom-designed and prefabricated, (iii) are stacked on top of each other, and (iv) are not mortared together, does not affect their classification as fire brick.

Additionally, the witness testified that the tubular articles before the court could be termed saggers as that word was known in 1930; that some people called the articles saggers, while others did not since it was a matter of definition; and that he personally would not call them saggers or retorts. He stated that the purpose of the imported articles was to form reaction chambers to contain the material being fired and to protect it from kiln gas during the reduction process.

Finally, Mr. Heiligman testified that his definition of fire brick included crucibles,<sup>4</sup> retorts<sup>5</sup> and kiln furniture.

Plaintiff's second expert witness was Professor Frederick H. Norton, a consultant in the general field of ceramics. His career began in 1923 when he was employed by the Babcock & Wilcox Company (one of the largest refractory manufacturers in the country) to develop new products and help in the methods of manufacture. After eight years with Babcock & Wilcox, he was appointed to the faculty of the Massachusetts Institute of Technology as head of the Division of Ceramics, a position he held until his retirement in 1961. He has received numerous honors and awards in the ceramics field and has published four books and over 100 articles in that field. One of his published books is *Refractories* which is generally considered to be the authoritative work on that subject.

Relating his testimony to the period around 1930, he stated that a refractory was a nonmetallic material capable of withstanding high temperatures, and that refractories can be divided into two general groups as follows: (1) fire brick which is formed to a specific size and shape in the plant and fired to stabilize that shape and size and then shipped to the customer to be used; and (2) granular refrac-

<sup>3</sup> Kiln furniture is defined as supports and containers for ceramic ware while it is being fired. See Norton, *Refractories* (3d ed., 1949) p. 527.

<sup>4</sup> The witness defined the term "crucible" as used in the refractories industry as a cylindrical shaped vessel, wider at the top than at the bottom, which will normally hold liquid metals of some kind.

<sup>5</sup> In the refractory industry, a retort, according to the witness, is a refractory vessel in which a metallurgic reaction takes place and the products of the reaction gases are conducted away.

tories such as castables, plastic refractories, mortars, etc., which are shipped in bulk. He then defined the term "fire brick" as a refractory article which is formed to a specific size and shape and then fired to stabilize it. In other words, in his opinion all shaped refractories are commonly referred to as "fire brick." He believed that the majority of persons in the industry used that definition, but agreed that a minority took a narrower view. In this connection, he said that there were a few people in the industry who defined fire brick as small fired refractories which had at least one rectangular side of specified dimensions and included arches and wedges which had such dimensions. However, he indicated that this was a very narrow definition and that the general opinion in the industry was that "fire brick" was defined in much broader terms, in accordance with his own previously stated definition.

The witness stated that the terms "refractory brick" and "fire brick" are often used as synonymous terms and that the word "brick" was an abbreviated term to describe both types of brick. Continuing, he testified that in 1930, fire brick was made in a great variety of sizes; that some—such as glass tank refractories—weighed as much as a ton; and that fire brick was made in a great variety of shapes, including tubes and rings.

The witness did not agree that fire brick is always used to construct or line furnaces or kilns; instead, he stated, it is used for other purposes such as in kiln furniture, as piles for supporting a floor, etc. He added that mortar is not always employed in the use of fire brick; that in order to be fire brick, the refractory did not have to be a masonry unit; and that in 1930, custom-designed articles which were major components of refractory structures were describable as fire brick.

Professor Norton further testified that he would consider the silicon carbide refractories before the court to be "fire brick" and that they would have been so considered as that term was understood in the refractory industry in 1930. In his opinion, the fact that the imported articles were custom-designed and assembled into reaction chambers by being stacked on top of each other without the use of mortar does not affect their classification as fire brick. In short (as previously indicated) he believed that all refractory shaped articles were commonly referred to as fire brick. Thus he testified that kiln furniture was describable as fire brick; that a retort—which he defined as a refractory vessel or container inside of which some reaction is taking place—was commonly referred to as a fire brick. Similarly, he stated that a crucible—which he defined as a refractory container used to contain a liquid such as metal or glass—was commonly referred to as a fire brick. He added that a crucible was also commonly referred to as a

crucible, and that the terms "fire brick" and "crucible" are virtually interchangeable, but that when crucibles are shown in a catalogue, they usually appear under the heading "fire brick."

On cross-examination, however, Professor Norton conceded that although his book *Refractories* (3d ed., 1949) contained (at p. 527) a discussion of kiln furniture—which (as mentioned previously) was described by Professor Norton as fire brick—nowhere in that discussion did he use the term "fire brick" or "brick" to describe that class of merchandise. Beyond that, notwithstanding that Professor Norton had testified that a retort was commonly referred to as "fire brick," that section of his book discussing retorts (pp. 531-2) made no reference to them as either "fire brick" or "brick." To like effect, although Professor Norton testified that a crucible was commonly referred to as a "fire brick," his book's discussion of crucibles (pp. 532-4) again made no reference to them as "fire brick" or "brick."

By contrast, his book in discussing so-called standard shapes and special shapes, such as cupola blocks, rotary-kiln blocks, circle-brick, and rectangular tile of fireclay (pp. 523-7), refers to them as refractory brick, fire brick or brick.

Questioned as to why his book referred only to the latter types of articles as refractory brick or brick and did not refer to articles such as kiln furniture, retorts and crucibles as fire brick or brick, Professor Norton responded as follows (R. 225) :

Well, I think it is understood by anybody in the industry. That is just an abbreviation of "fire brick" and the word is left off. It is an adjective and it isn't always put in place. I think it is understood by anybody in the industry that this is made of a type of fire brick, but it has a specific name.

Further on this aspect, when it was brought out that his book referred to kiln furniture merely as "kiln furniture," Professor Norton responded: "Well, *the whole book is about fire brick* and you have to assume that fire brick has specific names." (R. 219) [Emphasis added.] \*

On additional cross-examination, Professor Norton testified that he recognized A. B. Searle as an authority on refractories and agreed that in the first (i.e., 1931) edition of his own book he had referred to Searle's book, *Refractory Materials: Their Manufacture and Uses* (1924), as "probably the most complete book on refractories \* \* \*." (R. 235) The witness' attention was then directed to the following statement at p. 288 of the Searle book:

The *shape* of fireclay bricks must be as accurate as possible. They usually measure 9 inches by 4½ inches by 3 inches or 2½

\* The fact, however, is that a good deal of Professor Norton's book, *Refractories*, deals with granular refractories, such as plastic refractories, mortars, etc.—which, as the witness made clear in his testimony, are not fire brick. See e.g., chapters XI through XIV.

inches, with a small allowance for the mortar, in order that two-header bricks may lie exactly on a stretcher when the wall is built.

The variations from the average or specified measurements should not exceed 2 per cent.; some specifications are even more stringent than this. The reason is that irregularly shaped bricks require more mortar and cannot be laid with thin joints; and as firebricks nearly always perish first at the joints, if these are irregular or if the bricks are laid carelessly, they do not form a durable structure. \* \* \* [Emphasis in original.]

Professor Norton was then asked whether he believed that in the foregoing paragraphs Searle was using the term "fireclay brick" in the same broad, all encompassing sense in which he (Norton) had defined it, or was using the term in a narrower sense. To this Norton responded: "A broad sense. That would apply to any shape of brick." (R. 236)

Professor Norton further testified that in use the imported articles might be considered to act as a retort in the reduction of sponge iron. However, he believed that the articles would be described more accurately as a reaction chamber since a retort almost always has an opening on which certain products are distilled out of the reaction, whereas such distillation does not take place in the imported articles.

Defendant called as an expert witness Maurice A. Kohler, the New York District Sales Manager of the Babcock & Wilcox Company who has had extensive experience in the refractory field beginning in 1930 when he was 15 years of age. He testified that during the period from 1930 to the present there has been no change in the manner in which the term "fire brick" has been used in the industry and that a "fire brick" is a rectangular object made of clay or other matter which is made to withstand high temperatures without deformation. With regard to size and shape, he testified that to be fire brick, two of the three dimensions must have the same measurements as a standard brick size (i.e., 9 by 4½ by 2½ inches or 13½ by 4½ by 2½ inches). Thus, arches and wedges are included so long as these dimensional requirements are met. He further testified that in order that an article constitute fire brick, it must be used to construct or line furnaces or kilns.

According to the witness, the term "special shape" as used in the refractory industry refers to a shape that does not meet any of the dimensional requirements previously mentioned and is not considered to be a fire brick. Thus, articles such as kiln furniture, retorts and tubes are not fire brick.

He stated that there is a difference in moisture content between fire brick and special shapes; that they were dried out quite differently, with fire brick put through dryers, while special shapes were dried in

hot furnaces; that they were burned in entirely different manners; and that the manner in which bricks and special shapes were formed also determined whether a refractory was a fire brick or not. In this latter connection, he said, in 1930 shaped pieces such as cylinders were hand molded, whereas fire brick was for the most part either hand pressed, pressed out on a machine press or wire-cut. He also stated that there was a difference in pricing as between fire brick and other shapes. For example, the normal 9 and 13½ inch series brick were always sold at a price per thousand, while anything over that size was sold by the piece.

In Mr. Kohler's opinion, the imported articles in question were not describable in 1930 as fire brick because they did not conform to the 9 or 13½ inch dimensional requirements and failed to meet any of the other requirements. He added that in his 35 years' experience in selling refractories in the United States, Canada and Puerto Rico, he has never seen articles such as those here in issue bought, sold or referred to as fire brick.

On cross-examination of Mr. Kohler, it was developed that a catalogue of his employer, Babcock & Wilcox, issued some years ago, contained the following statements, among others:

Other services where Allmul Firebrick have established a record of long, economical service include, malleable iron air furnaces, hot metal mixers, non-ferrous melting furnaces, butt-weld pipe furnaces, burner blocks for all sorts of furnaces, kiln furniture and piers in ceramic and enameling furnaces, glass tanks, tunnel kilns and high temperature ceramic kilns.

\* \* \* \* \*

Because of their high hot-load strength and their other refractory qualities, B&W Allmul, 80, and Junior Firebrick are used to form car tops and kiln furniture for many types of ceramic furnaces. Other uses of B&W Firebrick in the ceramics industry include linings for rotary kilns, and high temperature tunnel and periodic kilns.

\* \* \* \* \*

Installations of B&W Firebrick will be found in almost every industry which utilizes heat in its manufacturing processes. B&W Allmul, 80, and Junior Firebrick are used for complete linings, partial linings in heavy duty areas, piers, checkers, burner blocks and special applications in a wide variety of industrial furnaces and other heat enclosures.

\* \* \* \* \*

Special Shapes of B&W Allmul, 80, and Junior Firebrick are fabricated to close tolerances for easy installation in the field.<sup>7</sup>

<sup>7</sup> Professor Norton testified that the information contained in this catalogue accorded generally with his understanding of the refractory industry's practice in 1930.

Mr. Kohler testified that he disagreed with the foregoing statements in the catalogue to the extent that they referred to all the foregoing articles as fire brick. He said that the statements were prepared by the advertising department and that quite often its advertising statements were in error and had to be corrected. He recalled that at one time he called one of these errors to the attention of the advertising department and that the advertising department indicated it would correct it. Instead, he testified that the entire catalogue was eliminated some five or six years ago and that the personnel responsible for it were dismissed. Presently, he said, the catalogue is in the process of revision, but had not as yet been reissued.

### III

From the foregoing, it is evident that as in *Rogers I* the testimony of plaintiff's expert witnesses at the present trial was in direct conflict with that of defendant's expert witness. Thus, similar to the situation in *Rogers I*, plaintiff's expert witnesses expressed the opinion that in 1930 all heat-resistant refractory shapes, which would include kiln furniture, retorts and crucibles, were commonly referred to as "fire brick." Defendant's witness, on the other hand, indicated that the term "fire brick" applied only to those heat-resistant refractory shapes which had at least one rectangular face of specified dimensions and had to be used to construct or line furnaces or kilns.

It is to be added that at the present trial the testimony of the expert witnesses for both sides was somewhat impaired on cross-examination. For example, while Professor Norton (as well as Mr. Heiligman) testified on direct examination that refractory shapes such as kiln furniture, retorts and crucibles were commonly referred to as "fire brick," it was developed on cross-examination of Professor Norton that his book *Refractories*—which, as previously indicated, is an authoritative work—did not so refer to them. And while defendant's expert witness Kohler testified on direct examination that the term "fire brick" was limited to refractory shapes which had at least one rectangular face and was used only to construct or line furnaces or kilns, cross-examination brought out the fact that a catalogue of his company, Babcock & Wilcox, used the terms "Allmal Firebrick," "Junior Firebrick" and "B&W Firebrick" in a much broader sense.

The short of the matter is that the testimony of the expert witnesses as to the common meaning of the term "fire brick" is inconclusive. Nor do I find helpful their conflicting testimony as to whether or not various articles are called "fire brick." For, as the trial court made clear in *Rogers I*, the provision for "fire brick" is a use provision and hence "it is not how an article is called but how it is used that determines whether it is [fire] brick \* \* \*." 64 Cust. Ct. at 18.

In view of these considerations, particular reliance must necessarily be placed on the lexicons. And on this phase, I am in accord with the conclusion of the trial court in *Rogers I*, based on lexicons and administrative publications, that "the essential criteria of a 'fire brick' are that it is a heat resistant article used in the construction of linings for furnaces, ovens, and similar installations." 64 Cust. Ct. at 16. Among the authorities cited in *Rogers I* which I believe are persuasive in reaching this conclusion are New Century Dictionary and Cyclopedias, 1913 edition; Glossary of Mining and Mineral Industry, U. S. Department of Interior, Bureau of Mines, Bulletin 95, 1920; Webster's New International Dictionary, 1927 edition; Materials Handbook, George S. Brady, second edition, 1931; Encyclopaedia Britannica (1947), volume 9, p. 266. 64 Cust. Ct. at 16-17. Beyond that, there are other lexicons, in addition to those cited in *Rogers I*, which similarly define "fire brick" as an article used for lining furnaces. Such lexicons include Funk & Wagnalls New College Standard Dictionary, 1947; The Winston Dictionary, Encyclopedic Edition, 1957; and Britannica World Language Edition of Funk & Wagnalls Standard Dictionary, 1963.<sup>8</sup>

Not without significance too is the recent decision in *Pittsburgh Plate Glass Company v. United States*, 73 Cust. Ct. —, C.D. 4553 (1974). In that case, so-called "tank blocks" of various sizes and shapes, mostly rectangular (1 by 2 by 3 feet) weighing between 800 and 900 pounds, which were used in constructing the lining in the lower portion of a float-glass furnace, were held to be "refractory bricks"<sup>9</sup> and thus within the purview of item 531.27 of the tariff schedules. In reaching this conclusion, the court (per Newman, J.) relied on *Rogers I* to find that "refractory bricks" (fire brick) are heat-resistant articles used in the construction of linings for furnaces, ovens and similar installations. The court further found that since, under the holding in *Rogers I*, size and shape are not essential criteria for fire brick, and since a float-glass furnace is a similar installation to an oven or furnace, the "tank blocks" in issue came within the common meaning of the term "refractory bricks" (fire brick). Finally, the court pointed out (73 Cust. Ct. at —, slip op. at 11-12) that the fact that the imports were generally bought, sold and known in the trade as "blocks" rather than as "bricks" did not preclude their classification as "refractory bricks"—this on the basis stated in *Rogers I*

<sup>8</sup> Although these lexicons were published after 1930, they are relevant since it is undisputed that the common meaning of the term "fire brick" has not changed appreciably over the years. See *Rogers I*, 58 CCPA at 109, note 5.

<sup>9</sup> It was undisputed that the terms "fire brick" and "refractory brick" are synonymous. *Id.* at —, slip op. at 6, note 2.

(64 Cust. Ct. at 18) that "it is not how an article is called but how it is used that determines whether it is [fire] brick \* \* \*."

In sum, it is concluded that since the importations in question are not articles used in the construction of linings for furnaces, ovens, or similar installations, they are not classifiable as "fire brick" under paragraph 201(a) of the Tariff Act of 1930, as modified. Therefore, plaintiff's claim under this provision must be rejected.

#### IV

We turn next to plaintiff's alternative claim that the importations are classifiable under paragraph 1514 of the Tariff Act of 1930, as modified, as manufactures in chief value of artificial abrasive (*viz.*, silicon carbide). With respect to this claim, the parties agree that the importations are in chief value of silicon carbide and that silicon carbide was one of the artificial abrasives contemplated by paragraph 1514 of the Tariff Act of 1930. On the basis of these considerations, plaintiff insists that the importations are covered by paragraph 1514 since that paragraph, according to plaintiff, is unconditional on its face and therefore covers any manufactured article, whatever its nature or use, which is composed in chief value of an artificial abrasive.

There is a basic difficulty with this argument, however. The difficulty is that paragraph 1514 is a use provision and in order to be classified thereunder, the silicon carbide must be chiefly used as an abrasive. And the fact is that the silicon carbide here involved is not used as an abrasive; to the contrary, it is chiefly used as a refractory item. See e.g., *United States v. C. J. Tower & Sons*, 35 CCPA 19, C.A.D. 365 (1947); *United States v. C. J. Tower & Sons*, 35 CCPA 22, C.A.D. 366 (1947).

The rule that a substance may be classified as an abrasive only when it is chiefly used as an abrasive was well stated in *Crystal v. United States*, 5 Ct. Cust. Appls. 489, T.D. 35148 (1915). In that case, the court held that powdered glass used on the heads of matches or sides of matchboxes was not classifiable under paragraph 432 of the Tariff Act of 1909 (the predecessor paragraph to paragraph 1514)<sup>10</sup> for the following reasons (*id.* at 490-1):

The rule is well settled, we take it, that when articles are provided for under a tariff designation descriptive of their use, the operation of such a provision, when brought in competition with some other provision adequately describing the goods, is limited to things which are chiefly used for the purpose mentioned. \* \* \*

<sup>10</sup> Paragraph 432 covered, among other things, "Crude artificial abrasives."

Powdered glass, therefore, can not be classified under paragraph 432 unless it be chiefly used as an abrasize, and whether it is so used depends on whether it acts as an abradant and serves a real abrasive purpose when employed as a friction agency on match heads and match boxes.

In our opinion, an abrasive is a substance designed and fitted to be used for the ruling, grinding, or wearing away of particles from the surfaces of wood, metal, stone, and other hard materials, in order to produce smoothness, a polish, an edge, or other desired modifications of the surface, or a reduction in the dimensions of the thing subjected to the action of the abradant. The true, final, and distinctive purpose of an abrasive is not to produce friction or heat but to create new surfaces by rubbing or grinding away older ones. \* \* \*

From what has been said, it is apparent that plaintiff's alternative claim for classification of the importations under paragraph 1514 is without merit.

## V

In summary, the court overrules plaintiff's claims for classification of the imported articles (1) as "fire brick" under paragraph 201(a) of the Tariff Act of 1930, as modified; and (2) alternatively, as manufactures in chief value of artificial abrasive under paragraph 1514 of the Tariff Act of 1930, as modified. Judgment will be entered accordingly.

(C.D. 4563)

### FLAGSTAFF LIQUOR COMPANY v. UNITED STATES

#### *Opinion and Order on Defendant's Motion for Summary Judgment and To Dismiss on Jurisdictional Grounds*

Court No. 71-12-02057

Port of New York

[Motion granted.]

(Dated October 31, 1974)

*Wilentz, Goldman & Spitzer (Steven T. Kessel of counsel) for the plaintiff.  
Carla A. Hills, Assistant Attorney General (Gilbert Lee Sandler, trial attorney), for the defendant.*

NEWMAN, Judge: Defendant has moved for summary judgment and dismissal of this civil action, brought pursuant to 28 U.S.C. § 2632(a) (1970).

Plaintiff, a wholesaler of domestic and imported wines, spirits and alcoholic beverages, imported from Great Britain 3,660 cases of "Beefeater Dry Gin", which were entered for warehousing at the New York region subport at Perth Amboy, New Jersey on December 17, 1968. The 3,660 cases were assessed with duty under the provision for "gin" in item 168.35 of the Tariff Schedules of the United States, and additionally were assessed with an internal revenue tax as "distilled spirits" under the provisions of 26 U.S.C. § 5001(a) (1964).

Plaintiff claims that the duty and tax were assessed on too great a quantity of merchandise; the rates of duty and tax are not in dispute. Specifically, plaintiff contends that pursuant to 26 U.S.C. § 5008(a) (1964) it is entitled to a refund of the duty (\$2,470.50) and tax (\$28,822.50) assessed on 915 cases because they were stolen from its bonded warehouse in Perth Amboy, New Jersey, allegedly "without [the] connivance, collusion, fraud, or negligence" of the importer, its employees or agents. Plaintiff also demands a judgment for interest, attorney's fees and costs of the suit.

Defendant's motion for summary judgment and dismissal of the action is grounded on the contention that the court lacks jurisdiction for the reason that plaintiff failed to file a protest within sixty days after liquidation in accordance with 19 U.S.C. § 1514 (1964).<sup>1</sup> Plaintiff concedes that it failed to file its protest within sixty days after liquidation; but opposes defendant's motion, contending that defendant is "barred" from raising the statute of limitations under section 1514 "by virtue of the fact that an agent of the government misrepresented material facts and induced plaintiff into not pursuing its statutory right to relief within the time limits specified by law".

I have concluded that defendant's motion should be granted.

<sup>1</sup> 19 U.S.C. § 1514 reads as follows:

"Except as provided in subdivision (b) of section 1516 of this title (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of any entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation".

## 1.

The record comprises the official papers forwarded to the court by the Regional Commissioner pursuant to 28 U.S.C. § 2632(f) (1970) and rule 3.2(f); the pleadings; an affidavit executed by Stephen Rineberg, plaintiff's vice president, submitted in opposition to defendant's motion; and an affidavit by Joseph A. Farrell, Port Director for United States Customs at Perth Amboy, New Jersey, submitted by defendant in response to Rineberg's affidavit.

The following material facts are not in dispute:

This case concerns entry number PA-199, dated December 17, 1968, which covered 3,660 cases of gin. It appears that 915 of the cases were stolen from plaintiff's premises while under bond on December 23 or 24, 1968. The theft was reported by plaintiff to the appropriate customs officials on December 24, 1968. In subsequently liquidating the entry on July 2, 1969, the Regional Commissioner made no allowance in duty or tax for the 915 stolen cases. Plaintiff failed to file a protest against such liquidation within sixty days thereafter, as prescribed by 19 U.S.C. § 1514.

On April 27, 1970, or 299 days after liquidation, plaintiff filed a claim for a refund of taxes (Internal Revenue Form 843), citing 26 U.S.C. § 5008(a) and asserting: "Claim for refund is made pursuant to 26 U.S.C. Sec. 5008(a). The tax was erroneously paid by the taxpayer because of inadvertence and ignorance of the applicable laws and regulations. The tax should not have been paid because the merchandise was lost by theft without the connivance, collusion, fraud or negligence of the taxpayer or its employees or agents. The loss has not been indemnified against or recompensed by the responsible insurance carriers though claim for same has been made".

On June 1, 1970, or 334 days after liquidation, plaintiff filed an application for an allowance in duty for theft (Customs Form 4315).

The above-mentioned claim and application were denied by the Regional Commissioner in a letter to plaintiff dated April 12, 1971 on the ground that no protest had been filed within sixty days after liquidation pursuant to section 1514. In that letter, the Regional Commissioner further advised plaintiff: "The importer (Flagstaff Liquor Co.), or their authorized agent may protest this decision by filing a protest on Customs Form 19 in quadruplicate within ninety (90) days after the date of this letter in accordance with Section 1514(a)(7), Title 19, United States Code".

Within ninety days of the Regional Commissioner's letter (June 17, 1971), plaintiff filed a protest against the denial of its claims for refund of duty and tax. The protest was denied on July 16, 1971 on the basis that the Regional Commissioner's original decision was found

to be correct. Moreover, the Regional Commissioner commented that plaintiff's claim was "[n]ot correctible under Section 1520(c)(1) Title 10 USC".

Thereafter, on December 14, 1971 plaintiff filed a summons initiating this action against the denial of its protest of June 17, 1971.

2.

Plaintiff concedes it is not entitled to relief pursuant to section 1520(c) for "clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law". As previously mentioned, plaintiff further admits that it failed to file its protest within sixty days after the liquidation, as required by 19 U.S.C. § 1514. However, plaintiff insists that defendant should be "barred" from asserting such sixty day statute of limitations under section 1514 because the failure to file a timely protest was due to "misrepresentations" by a customs official. Hence, while not articulated as such, it is clear that plaintiff relies upon the familiar doctrine of equitable estoppel.

3.

At this juncture, it should be pointed out that the alleged "misrepresentations" were made during a conversation between Mr. Rineberg, plaintiff's vice president, and Mr. Farrell, the Port Director at Perth Amboy, New Jersey. As noted, the affidavits of both Rineberg and Farrell are part of the record in these proceedings.

The conversation between Rineberg and Farrell occurred at plaintiffs' premises on December 24, 1968 as a consequence of plaintiff's discovery in the morning that a container holding 915 cases of the imported gin had been stolen. Previously, Rineberg had transacted customs business with Farrell, and the latter impressed Rineberg as "a person who exercised considerable authority with respect to the operations of the Port of Perth Amboy, and a person who was knowledgeable in the area of customs and import regulations" (Rineberg affidavit, paragraph 5).

Rineberg related to Farrell the then known facts concerning the theft of the gin, and "asked Mr. Farrell to explain Flagstaff's obligations to the United States Government with respect to the missing cases of gin" (Rineberg affidavit, paragraph 7). Continuing, Rineberg averred that the "misrepresentations" of Farrell, which allegedly deterred plaintiff from filing a timely protest, are as follows: (1) "Flagstaff was under an absolute duty to pay both alcohol excise tax and customs duties on the missing cases of gin" (paragraph 8); (2) "the United States Government would proceed against Flagstaff's warehouse operator and/or carrier's bond in the event that Flagstaff

failed to or refused to make payment" (paragraph 9); (3) "if the United States proceeded against said bonds, Flagstaff's position as an approved bonded warehouse operator and carrier would be jeopardized" (paragraph 10); and (4) "Farrell [did not] advise me that I had a statutory right to protest the payment of taxes or duties" (paragraph 13).

Rineberg further argues: "[I]t appeared that the obligation to pay such taxes and duties was absolute and not subject to any challenge or discretionary action on the part of any government official" (paragraph 12); and "Mr. Farrell's statements and those of the Customs House to me led me to believe that not only was Flagstaff obligated to pay said taxes and duties but that Flagstaff had no recourse to challenge Mr. Farrell's assertions" (paragraph 17).

It also appears from Rineberg's affidavit that it was not until March 1970 that plaintiff consulted its attorneys, and "was advised that it was conceivable that there existed a statutory right to make claims for refund of the customs duties and alcohol excise taxes paid on the missing 915 cases of gin" (paragraph 15).

In summary, as expressed in its brief: "[P]laintiff was misled into believing that it must pay the contested taxes and duties, that to dispute said taxes and duties would result in serious adverse consequences to plaintiff, and that in any event, there existed no procedure by which a contest could be made".

I have determined, however, that as a matter of law the averments in Mr. Rineberg's affidavit do not establish any basis for an equitable estoppel predicated upon misrepresentation.

#### 4.

First, plaintiff has failed to show wherein any of the statements attributed to Farrell were either erroneous or misleading. On the contrary, they appear to be substantially accurate.

As of December 24, 1968, when the conversation occurred, there had been no administrative or judicial determination to abate the duty and tax on the stolen cases of gin, and thus at that time plaintiff was indeed "under an absolute duty" to pay duty and tax on the 915 cases of gin. And although the subject of protesting the assessment did not arise in the conversation, it is of course fundamental that payment of liquidated duties and taxes was a condition precedent to filing a protest and to confer jurisdiction in this court. *The A. W. Fenton Co., Inc. v. United States*, 55 CCPA 54, C.A.D. 933 (1968); *Marvin Schnitzer Machinery Co. v. United States*, 62 Cust. Ct. 71, C.D. 3680 (1969); *Korlis, Ltd. v. United States*, 56 Cust. Ct. 365, C.D. 2660 (1966); *A. Zerkowitz & Co., Inc. v. United States*, 48 Cust. Ct. 437, Abs. 66724 (1962); *A.*

*Zerkowitz & Co., Inc. v. United States*, 48 Cust. Ct. 438, Abs. 66725 (1962); *A. Zerkowitz & Co., Inc. v. United States*, 48 Cust. Ct. 439, Abs. 66726 (1962); *Samoca Distributing Co. v. United States*, 48 Cust. Ct. 392, Abs. 66633 (1962). Indeed, had plaintiff withheld payment of duty and tax for the stolen merchandise, upon which no allowance had been made, there can be little doubt that in due course the Government would have proceeded against plaintiff's bonds.

Whether plaintiff's status as a bonded cartman and warehouseman would have been "jeopardized", while somewhat conjectural, is not a "misrepresentation". In this connection, it may be noted that licenses to operate as a bonded warehouseman or cartman are revocable for "reasonable cause", and particularly for negligence or carelessness in the handling of goods. See 19 CFR §§ 19.3(c) and 21.8(a) (1967).

Second, there is no averment in Rineberg's affidavit that Farrell stated that plaintiff had no right to file a protest. Rather, plaintiff relies upon Farrell's silence concerning plaintiff's statutory right to file a protest pursuant to section 1514. The general rule is: "estoppel by silence" does not ordinarily arise where there is no affirmative duty to speak. See 31 C.J.S. Estoppel § 87, p. 485; 53 C.J.S. Limitations of Actions § 25, p. 964. Significantly, it is well settled that customs officials are not required to advise importers as to the nature and extent of their rights.

In *Wilmington Shipping Company v. United States*, 52 Cust. Ct. 642, A.R.D. 174 (1964), *aff'd*, 52 CCPA 89, C.A.D. 864 (1965), the appeals for reappraisal were dismissed for untimeliness in that they were prematurely filed before appraisal. In opposition to defendant's motion to dismiss the appeals for untimeliness, plaintiff relied upon conversations between its customhouse broker and the customs officials, whereby the latter erroneously advised the former that the appraisal had been made on a particular date (October 28, 1960) at the values set forth in the appraiser's written notice of probable unpaid duties. Such notices advised the plaintiff that the appraiser *contemplated* appraisal at certain increased values; but in point of fact and law, appraisements were not completed until a later date (November 10, 1960) when notices of appraisal were mailed to plaintiff.

In affirming the decision and judgment of the trial court dismissing the appeals as prematurely filed, the appellate term held (52 Cust. Ct. at 649):

It is regrettable that customs officials told plaintiff's agent that the merchandise had been appraised on October 28, 1960, and advised him to file appeals for reappraisal at that time. However, written notices of appraisal were sent to plaintiff when the appraisal was completed, and plaintiff could then

have investigated and could then have filed timely appeals. *It is well settled that customs officials are not required to advise importers as to the nature and extent of their rights.* *Jacksonville Paper Co. v. United States*, 30 CCPA 158, C.A.D. 228; *F. B. Wilson v. United States*, 13 Cust. Ct. 96, C.D. 876; *United States v. Kenneth Kittleson and E. W. Rollow*, 43 CCPA 31, C.A.D. 605. In the *Jacksonville* case, the court said:

That the importer was "influenced" by the officials to make the entry seems to be true, and the importer's agents evidently obtained the impression that such entry was "required" as a condition precedent to obtaining the merchandise, but it could not have been legally "required," and had importer tendered proper bond all its statutory rights could have been preserved by its following the defined statutory procedure. [Pp. 164, 165.]

There are certain legal precepts that may not be overlooked. It is well settled that there is no inherent right to sue the United States, that such right is permissible, and that a suit against the United States can be maintained only pursuant to the terms laid down in the grant of permission. Congress may attach to its consent to sue such conditions as it deems proper. *Reid v. United States*, 211 U.S. 529; *United States v. Loeb & Schoenfeld Co.*, 7 Ct. Cust. Apps. 380, T.D. 36961; *ex parte Bakelite Corporation*, 279 U.S. 438; *Munro v. United States*, 303 U.S. 36; and others.

Appellant has failed to bring itself within the statutory grant of permission conferred by section 501. [Emphasis added.]

Additionally, it must be observed from Rineberg's affidavit that the affiant asked Farrell to explain plaintiff's "obligations" to the Government and not its "rights" (paragraph 7). Hence, for this additional reason I see no justification for holding that Farrell was obliged to advise Rineberg that plaintiff could protest the assessment.

Third, plaintiff was not reasonably misled concerning its right to file a protest. Here, it may be stressed that plaintiff is an experienced importer who retained a customhouse broker to make entries (Dorf International, Ltd.), and plaintiff also is a licensed bonded warehouseman and cartman.

Fundamentally, in the law of estoppel, one claiming to have been misled through lack of knowledge of certain facts must have been without convenient or ready means of acquiring such knowledge, and must have exercised reasonable diligence to acquire knowledge of the true facts. "If he conducts himself with a careless indifference to means of information reasonably at hand \* \* \* he cannot invoke the doctrine of estoppel". 31 C.J.S. Estoppel § 71, p. 435. It has also been stated: "[I]n order to serve as the basis of such an estoppel [to plead the statute of limitations], the fraud must be of a character to prevent

inquiry, to elude investigation, or otherwise to mislead the party having the cause of action, and in this connection it has been held that plaintiff is under a duty to exercise reasonable care and diligence". 53 C.J.S. Limitations of Actions § 25, p. 965.

Unfortunately plaintiff, who now professes to have been greatly concerned on December 24, 1968 about its right to protest the assessment of duty and tax on the stolen gin, apparently did not consult either its broker (Dorf) or its attorneys respecting the matter until March 1970, nearly fifteen months after the theft. Apropos, therefore, are the following observations of our appellate court concerning an importer's duty to protect its rights in *Jacksonville Paper Co. v. United States*, 30 CCPA 159, 164, C.A.D. 228 (1943), cert. denied, 320 U.S. 737 (1943) :

The importer unfortunately did not see fit to confer with counsel and receive advice as to his legal rights before making the entries and *it was a mistake on the part of Mr. McGehee to assume that it was the duty of the customs officials fully to advise him*. They could not, of course, have bound the Government by advising him nor was the importer bound by their statements. *It was the duty of importer to protect its legal rights*, which, as the trial court pointed out, it readily might have done by making a test case of the April, 1936, entry. [Emphasis added.]

Finally, even assuming *arguendo* that Farrell gave Rineberg wrong advice which reasonably misled plaintiff into not filing a timely protest, as a matter of law the doctrine of equitable estoppel may not be invoked against the United States under such circumstances.

In *Wilmington Shipping Company*, the Government was not barred from asserting that plaintiff's appeals for reappraisement were prematurely filed notwithstanding plaintiff's reliance in filing the untimely appeals upon the erroneous advice of the customs officials.

A long line of authorities in other federal courts have rejected the application of equitable estoppel against the United States, despite the fact that misinformation or erroneous advice of the Government's agents or employees deterred the plaintiffs from filing timely actions. "[I]t is well established that the government is not estopped by such acts of its agents as the giving of improper advice". *Rock v. United States*, 279 F. Supp. 96, 101 (S.D.N.Y. 1968)

In a "rider" attached to its summons, plaintiff contends that the "dictates" of Mr. Farrell were "beyond his authority". But "[l]ack of authority is fatal to a claim of estoppel based upon the conduct of an agent. All who deal with any agent of the United States are charged with notice of his lawful authority". *United States v. Certain Parcels of Land*, 131 F. Supp. 65, 73 (S.D. Calif. 1955). "The law is also well established that the United States, as a sovereign, cannot be

estopped by unauthorized acts of its agents or employees". *Jackson v. United States*, 284 F. Supp. 586, 588 (E.D.S.C. 1964). "And when statutes of limitations are fixed by Congress they may not be lengthened by estoppel or waiver by agents of the United States". *Kindrew v. United States*, 352 F. Supp. 277, 278 (M.D. Fla. 1972), *aff'd*, 479 F. 2d 49 (CA 5, 1973).<sup>2</sup>

The Plaintiff's own lack of diligence in purposefully pursuing the cause within the required statutory period results in a forfeiture of the cause of action. This plightful ending was precisely described in *Martin v. Grace Line, Inc., supra*:

"Such unfortunate results will probably occur so long as there are statutes of limitations. However, statutes of limitations exist to protect other important interests, which must also be accommodated."

In *Ritter v. United States*, 19 F.2d 251 (W.D.Pa. 1927), *aff'd*, 28 F.2d 265 (CCA 3, 1928), the Government was held not estopped to raise plaintiff's failure to file a written claim for a refund of an overpayment of income tax within the statutory time limit, notwithstanding the fact that a revenue field agent misled plaintiff into believing that an oral claim made to him at the audit was sufficient compliance with the applicable statutes and regulations. There, the Circuit Court of Appeals stated (28 F.2d at 267) :

\* \* \* It is unfortunate and to be regretted that the plaintiff finds himself in the position in which his negligence, misunderstanding, or the unauthorized statement of the filed agent, Timberlake, places him, but the sovereign government may not be sued, except upon its consent, and then only upon the conditions under which it has consented to be sued, even though they be purely formal. \* \* \*

In *Jackson*, the District Court held, in an action under the Federal Tort Claims Act, that the Government was not estopped from raising the two year statute of limitations where the failure of the incompetent plaintiff's son to file a timely action on behalf of the plaintiff was the result of certain unauthorized statements of a Government officer.

Further, in *Taylor v. Flemming*, 186 F. Supp. 280 (W.D.Ark. 1960), plaintiff failed to file proof of support within the time specified by statute, which proof was a condition precedent to recovery of dependent parent's insurance benefits under the Social Security Act. The District Court held that the Government was not estopped to assert plaintiff's ineligibility for benefits, although plaintiff had relied upon erroneous information given her on inquiry at a social security office prior to the expiration of the time for filing proof of support. The court commented (186 F. Supp. at 284) :

<sup>2</sup> To the same effect see *Kruhmin v. United States*, 177 F. 2d 906, 907 (CA 3, 1949).

As noted above, the plaintiff contends that she made an inquiry at the Social Security Office in Sacramento, California, concerning the proof of support prior to July 31, 1951, and she was informed that she did not have to file such a proof. In plaintiff's brief her attorney argues as follows:

"Since the United States Government can act only through its agents, it would be shocking to allow the United States Government to misinform an individual as to her rights, and then absolve itself from an obligation to that individual because of her reliance upon the misinformation."

It is apparent that plaintiff is attempting to assert some type of estoppel against the defendant; however, no cases are cited in support of this position. If Mrs. Taylor did rely to her detriment upon such a statement, it is indeed unfortunate. However, the Government cannot be estopped from insisting upon performance of statutory conditions precedent by the unauthorized acts of an employee of a local Social Security Office. \* \* \*

Similarly, in *Flamm v. Ribicoff*, 203 F. Supp. 507 (S.D.N.Y. 1961), the Government was held not to be estopped from raising the defense of plaintiff's failure to comply with the statutory requirements for recovery of social security benefits despite the circumstances that the social security office gave "misinformation" concerning the time when application for benefits should have been filed. The court stated (203 F. Supp. at 510):

Secondly, plaintiff claims that "misinformation" was given to Mrs. Berger's son-in-law over the telephone in July 1956 by an employee of the midtown Social Security office and that she delayed the filing of her written application until December 1958 in reliance thereon. She urges that defendant is therefore estopped by the acts of the Government employee from raising the defense of failure to comply with the statute and regulations so as to limit here benefits to one year prior to the filing of her 1958 application.

It is by no means clear that Mrs. Berger's son-in-law was in fact misinformed by the Social Security office and that what he received from that office was not merely sound advice that the claimant should have accurate information available as to her date of birth. But even assuming that he did receive "misinformation" on which Mrs. Berger acted to her detriment, it is plain that estoppel will not lie against the Government under these circumstances. *Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees.* Failure to comply with the applicable statute and regulations precludes recovery against the Government "no matter

with what good reason" the claimant believed she had come within the requirements. *Estoppel will not lie regardless of the financial hardship "resulting from innocent ignorance."* *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10; *Walker-Hill Co. v. United States*, 162 F.2d 259 (7 Cir. 1947), cert. den. 332 U.S. 771, 68 S.Ct. 85, 92 L.Ed. 356; *James v. United States*, 185 F.2d 115, 22 A.L.R.2d 830 (4 Cir. 1954). [Emphasis added.]

Again, in *Commissioner of Internal Revenue v. Duckwitz*, 68 F.2d 629 (CCA 7, 1934), the Circuit Court of Appeals affirmed the holding of the Board of Tax Appeals rejecting the taxpayer's contention as to estoppel of the Government to claim a deficiency income tax because of the careless and unofficial expression of opinion by the solicitor in the Bureau of Internal Revenue.

Other cases wherein the courts have held that estoppel is inapplicable against the United States where the statute of limitations has run are: *Claremont Aircraft, Inc. v. United States*, 420 F.2d 896, 898 (CA 9, 1970); *Legerlotz v. Rogers*, 266 F.2d 457, 459 (CA D.C. 1959), cert. dismissed, 362 U.S. 938 (1960); *Bono v. United States*, 113 F.2d 724, 725 (CCA 2, 1940). See also *Taxation: Reliance on advice of Government officials*. 33 Cornell Law Quarterly 607, 612, which concludes: "In short, equitable estoppel is but rarely successfully invoked by a taxpayer against the Government".

Plaintiff relies heavily upon *Scarborough v. Atlantic Coast Line R. Co.*, 202 F.2d 84 (CA 4, 1953), and *Fravel v. Pennsylvania R. Co.*, 104 F. Supp. 84 (D. Md. 1952), wherein both courts held that fraud barred the defendant railroads from relying upon the statute of limitations under the Federal Employers' Liability Act. Plaintiff's reliance on those cases is misplaced, inasmuch as in each case the defendant was a private party and not the United States. No decision is cited by plaintiff wherein a statute of limitations for actions against the United States was tolled, or the principle of equitable estoppel applied, on the ground that the plaintiff received erroneous advice from a Government official.

Accordingly, it is plain that the doctrine of equitable estoppel is inapplicable in this case, and that defendant is not barred from raising the statute of limitations as a defense.

5.

As previously mentioned, plaintiff seeks a refund of both the *duty* and internal revenue tax assessed upon the stolen gin. However, 26

U.S.C. § 5008(a), upon which plaintiff predicates its right to relief, mentions only internal revenue tax.<sup>8</sup>

In *Chicago Heights Distributing Company v. United States*, 55 Cust. Ct. 254, C.D. 2586 (1965), imported Scotch whiskey was stolen while in the custody of a bonded cartman, who was acting as the importer's agent in transferring the merchandise from the place of unloading to the importer's bonded warehouse. The question before the court was whether the plaintiff was entitled to a refund of customs duties and internal revenue taxes assessed upon the merchandise in liquidation. Plaintiff urged that it was entitled to an abatement of duties and taxes assessed against the stolen merchandise because the theft occurred without negligence, on the part of the cartman, relying upon 19 U.S.C. § 1001, paragraph 813 and 26 U.S.C. § 5011, in support of its contention. Defendant argued that there were no provisions of the customs or internal revenue laws authorizing abatement of duties and taxes, as claimed by plaintiff, and that even if there were such laws, the negligence of the cartman precluded abatement as a matter of law.

Respecting abatement of duties, the court commented (55 Cust. Ct. at 257-258) :

\* \* \* It appears that no statutory provisions have been made for the abatement of duties for a theft of imported merchandise not occurring while the merchandise is in the appraiser's stores (see 19 U.S.C.A., section 1563). "Congress has not provided that the Government shall be an insurer of imported goods while in customs custody . . .," *Mills & Gibb Corporation v. United States*, 13 Ct. Cust. Apps. 72, 74, T.D. 40933. A broader provision for such relief does exist, however, with respect to abatement of *internal revenue taxes* by reason of the theft of distilled spirits under 26 U.S.C.A., section 5008 (section 5008, Internal Revenue Code of 1954, as amended). \* \* \*

We do not think that section 5008 is applicable, however, to customs duties as claimed by plaintiff perforce of paragraph 813.  
\* \* \* [Emphasis added.]

<sup>8</sup> 26 U.S.C. § 5008(a) provides so far as pertinent :

"(a) Distilled spirits lost or destroyed in bond.

(1) Extent of loss allowance.

No tax shall be collected in respect of distilled spirits lost or destroyed while in bond, except that such tax shall be collected—

(A) Theft.

In the case of loss by theft, unless the Secretary or his delegate finds that the theft occurred without connivance, collusion, fraud, or negligence on the part of the proprietor of the distilled spirits plant, owner, consignor, consignee, bailee, or carrier, or the employees or agents of any of them \* \* \*".

Consequently, insofar as the *duty* aspect of this case is concerned, 26 U.S.C. § 5008(a) does not confer any jurisdiction upon this court to grant relief. Respecting plaintiff's application for allowance in duty (Customs Form 4315) filed on June 1, 1970 and denied on April 12, 1971, the provisions of 19 U.S.C. § 1563(a) (1964) were applicable.<sup>4</sup> In *Camilo E. Rosello, Inc. v. United States*, 63 Cust. Ct. 454; C.D. 3935 (1969), plaintiff filed with the Collector of Customs an application on Customs Form 4315 for a refund of duties paid on an importation of plywood destroyed in a fire. The application was denied by the Collector, and following the liquidation of the entries, plaintiff protested the decision. With reference to section 1563(a), the court stated (63 Cust. Ct. at 456):

And as for relief under subsection (a) of section 1563 the court is powerless to review any determination of the Secretary of the Treasury made thereunder even if plaintiff has brought itself within the ambit of that statute. The decision of the Secretary of the Treasury under that statute with respect to duty refunds is final and conclusive upon all persons and not subject to review by or in this court. *Delia Failde v. United States, supra.* [51 Cust. Ct. 170, Abs. 67894 (1963).] Under the circumstances, the protest herein is overruled.

See also: *Armour and Company v. United States*, 29 Cust. Ct. 296, C.D. 1482 (1952); *Battat Imp-Export Co., Inc. v. United States*, 43 Cust. Ct. 397, Abs. 53502 (1959).

Plainly, then, insofar as plaintiff seeks judicial review of the Government's denial of its application for an allowance in duty, this court would lack jurisdiction, even assuming a timely protest were filed.

#### 6.

The decision of the Regional Commissioner regarding the quantity of gin upon which duty and tax would be assessed (and to include the stolen gin in the dutiable quantity) merged in the liquidation, and became final and conclusive upon all parties under 19 U.S.C. § 1514,

<sup>4</sup> 19 U.S.C. § 1563(a), on which plaintiff's application for a duty allowance (Customs Form 4315) was apparently based, reads in relevant part as follows:

"(a) In no case shall there be any abatement or allowance made in the duties for any \* \* \* loss \* \* \* sustained by any merchandise while remaining in customs custody, except that the Secretary of the Treasury is authorized, upon production of proof satisfactory to him of the loss or theft of any merchandise while in the appraiser's stores, \* \* \* to abate or refund, as the case may be, the duties upon such merchandise, in whole or in part, and to pay any such refund out of any moneys in the Treasury not otherwise appropriated \* \* \*. The decision of the Secretary of the Treasury as to the abatement or refund of the duties on any such merchandise shall be final and conclusive upon all persons".

since no protest was filed within sixty days of liquidation. *Clover Linen Corporation v. United States*, 26 Cust. Ct. 275, C.D. 1335 (1951); *Parrott & Co., Frank P. Dow Co., Inc. v. United States*, 30 Cust. Ct. 133, C.D. 1511 (1953). See also *United States v. Westco Liquor Products Co.*, 38 CCPA 101, 107, C.A.D. 446 (1951). Accordingly, defendant is entitled to summary judgement and dismissal of this action as a matter of law, and its motion is hereby granted.

# Decisions of the United States Customs Court

## Abstracts

### *Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, November 4, 1974.  
The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,  
*Commissioner of Customs.*

## CUSTOMS COURT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	PORT OF ENTRY AND MERCHANDISE	
						Par. or Item No. and Rate	Par. or Item No. and Rate
P74/821	Watson, J. October 29, 1974	North American Phillips Co., Inc.	63/4594, etc.	Par. 367 19%	Par. 353 134%	R. J. Saunders & Co., Inc. v. U.S. (C.D. 4887)	San Francisco/Oakland Shaver cases
P74/822	Richardson, J. October 30, 1974	Kreiss Corporation	65/10634, etc.	Item 633.40 19%	Item 688.40 11.5%	Ross Products, Inc. v. U.S. (C.A.D. 994)	San Diego Electric bird cages
P74/823	Richardson, J. October 30, 1974	New York Merchandise Co., Inc.	63/60109, etc.	Item 633.40 19%	Item 688.40 11.5%	U.S. v. L. Ballin & Son, Inc. (C.A.D. 1111)	San Diego Electric bird cages
P74/824	Watson, J. October 30, 1974	Joseph Markovits et al.	69/63209, etc.	Item 748.20 28%	Item 774.40 17%	Joseph Markovits, Inc. v. U.S. (C.D. 4890)	New Orleans Artificial flowers, etc.
P74/825	Watson, J. October 30, 1974	N.H.M. Corp.	60/37719, etc.	Item 748.20 28.3% or 26%	Item 774.40 15% or 14.5%	Armbee Corporation et al. v. U.S. (C.D. 4878)	Los Angeles Merchandise in c.v. of plastic
P74/826	Watson, J. October 30, 1974	North American Phillips Co., Inc.	61/12324	Par. 367 20% or 19%	Par. 353 184%	R. J. Saunders & Co., Inc. v. U.S. (C.D. 4887)	San Francisco/Oakland Shaver cases

# Decisions of the United States Customs Court

## Abstracts

### Abstracted Reappraisal Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R74/2663	Re. J. October 20, 1974	Castelato & Associates et al.	RS6/1268	Export value: Not appraised value less than 71 1/2%, net packed etc.	Not stated	U.S. v. Gets Bros. & Co., et al. (C.A.D. 9/27)	Los Angeles Japanese plywood
R74/2677	Re. J. October 20, 1974	J. Cortina et al.	R61/10009	Export value: Not appraised value less than 71 1/2%, net packed etc.	Not stated	U.S. v. Gets Bros. & Co., et al. (C.A.D. 9/27)	Tampa Japanese plywood
R74/2686	Re. J. October 20, 1974	Gets Bros. & Co. et al.	R65/7018	Export value: Not appraised value less than 71 1/2%, net packed etc.	Not stated	U.S. v. Gets Bros. & Co., et al. (C.A.D. 9/27)	Los Angeles Japanese plywood
R74/2690	Re. J. October 20, 1974	Toyomaka, Inc., et al.	RS9/2894	Export value: Not appraised value less than 71 1/2%, net packed	Not stated	U.S. v. Gets Bros. & Co., et al. (C.A.D. 9/27)	Los Angeles Japanese plywood

# Tariff Commission Notices

*Investigations by the United States Tariff Commission*

DEPARTMENT OF THE TREASURY, November 14, 1974.

The appended notices relating to investigations by the United States Tariff Commission are published for the information of Customs Officers and others concerned.

VERNON D. ACREE,  
*Commissioner of Customs.*

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[TEA-F-86]

PETITION OF HADDAD SHOE CORP. FOR A DETERMINATION UNDER SECTION 301(c)(1) OF THE TRADE EXPANSION ACT OF 1962

*Notice of investigation and hearing*

On the basis of a petition filed under section 301(a)(2) of the Trade Expansion Act of 1962 on behalf of the Haddad Shoe Corp., Lancaster, Pennsylvania, the United States Tariff Commission, on November 6, 1974, instituted an investigation under section 301(c)(1) of the said Act to determine whether, as a result in major part of concessions granted under trade agreements, articles like or directly competitive with footwear for men, youths and boys and women, misses and children (of the types provided for in items 700.35, 700.43, 700.45, and 700.55 of the Tariff Schedules of the United States) produced by the aforementioned firm, are being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to such firm.

A public hearing in connection with this investigation will be held beginning at 10:00 a.m., E.S.T., on November 26, 1974, in the Hearing Room, U.S. Tariff Commission Building, 8th and E Streets, N.W., Washington, D.C. Requests for appearances at the hearing should be entered with the Secretary of the Commission, in writing, at his office in Washington, D.C., no later than noon, Thursday, November 21, 1974.

The petition filed in this case is available for inspection at the Office of the Secretary, United States Tariff Commission, 8th and E Streets, N.W., Washington, D.C. 20436, and at the New York City offices of the Tariff Commission located at 6 World Trade Center.

By order of the Commission.

KENNETH R. MASON,  
*Secretary.*

*Issued November 12, 1974.*

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[337-L-78]

CERTAIN HIGH FIDELITY AUDIO AND RELATED EQUIPMENT

*Notice of complaint received*

The United States Tariff Commission hereby gives notice of the receipt on July 26, 1974, of a complaint under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), filed by Audio Warehouse Sales, Inc., Washington, D.C., Douglas T.V. Hi-Fi Stereo Center Corp., Washington, D.C., and Plaza Audio Video, Inc., Hyattsville, Md., alleging unfair methods of competition and unfair acts, including but not limited to resale price maintenance, in the importation and sale of certain high fidelity audio and related equipment, which unfair acts have the effect or tendency to restrain or monopolize trade and commerce in the United States. The complaint names U.S. Pioneer Electronics Corp., Moonachie, N.J., and Pioneer Electronic Corp., Tokyo, Japan, as engaging in the unfair acts.

In accordance with the provisions of section 203.3 of its Rules of Practice and Procedure (19 C.F.R. 203.3), the Commission has initiated a preliminary inquiry into the issues raised in the complaint for the purpose of determining whether there is good and sufficient reason for a full investigation, and if so whether the Commission should recommend to the President the issuance of a temporary exclusion from entry under section 337(f) of the Tariff Act.

A copy of the complaint is available for public inspection at the Office of the Secretary, United States Tariff Commission, 8th and E Streets, N.W., Washington, D.C., and at the New York City office of the Tariff Commission located at 6 World Trade Center.

Information submitted by interested persons which is pertinent to the aforementioned preliminary inquiry will be considered by the Commission if it is received not later than December 13, 1974. Exten-

sion of time for submitting information will not be granted unless good and sufficient cause is shown thereon. Such information should be sent to the Secretary, United States Tariff Commission, 8th and E Streets, N.W., Washington, D.C. 20436. A signed original and nineteen (19) true copies of each document must be filed.

**By order of the Commission:**

KENNETH R. MASON,  
*Secretary.*

Issued November 7, 1974.

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